Hoffman Plastic Compounds, Inc. *and* Casimiro Arauz. Case 21–CA–26630

July 29, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On November 12, 1993, Administrative Law Judge Jay R. Pollack issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent made a valid verbal offer of reinstatement to Moises Gonzalez on March 10, 1989. It is well established that an offer of employment must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation. *Holo-Krome Co.*, 302 NLRB 452, 454 (1991), enf. denied on other grounds 947 F.2d 588 (2d Cir. 1991), rehearing denied 954 F.2d 108 (2d Cir. 1992). Gonzalez testified that he understood that the Respondent's reinstatement offer was specifically for his former job at his former rate of pay. Gonzalez immediately accepted the offer of reinstatement. In addition, the credited testimony establishes that the Respondent did not demand that Gonzalez make an immediate decision to accept the offer and did not condition its offer of reinstatement on the withdrawal of Gonzalez' unfair labor practice charge or any other factor. We accordingly find that the Respondent made Gonzalez a valid offer of reemployment and satisfied its remedial obligation in this regard.

The General Counsel has also excepted to the judge's finding that the Respondent terminated Gonzalez, following his acceptance of reinstatement, pursuant to its policy imposing termination on any employee who fails to, in the words of Plant Manager Wilkerson, ''call in or . . . show up for three days.'' The record establishes that Gonzalez did not report to work for his scheduled evening shifts on March 11 or 12, 1989, did not thereafter report for work, and that Wilkerson terminated Gonzalez in the afternoon of March 13, 1989, on the failure of Gonzalez to contact Wilkerson. The General Counsel contends that the Respondent, under its policy, was required to wait until Gonzalez had failed to appear for his third consecutive evening shift on March 13, 1989, before terminating him, that accordingly the Respondent improperly applied its policy in terminating Gonzalez, and hence that its backpay liability is not tolled. Under the circumstances of this case, we need not decide whether the Respondent improperly applied its policy in terminating Gonzalez. Rather, we find that the Respondent's backpay obligation to Gonzalez was tolled because the Respondent made a valid offer of reinstatement which Gonzalez accepted, and Gonzalez thereafter failed to adhere to his side of the agreement and make himself available for work. See generally *American Mfg. Co. of Texas*, 167 NLRB 520, 521 (1967).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hoffman Plastic Compounds, Inc., Paramount, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order with respect to discriminatee Moises Gonzalez.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also note the General Counsel's exception that the judge failed to make a credibility determination as to the events occurring on March 13, 1989. Contrary to the General Counsel's contention, the judge credited Supervisor Ramon Rosas' testimony that on that date Moises Gonzalez did not meet with Plant Manager Wilkerson but rather met Rosas and stated that he had ''messed up'' by failing to report to work.

We shall in addition correct the following two errors by the judge. In the third paragraph of the ''Findings and Conclusions'' section of the judge's decision, the judge stated that Gonzalez was offered reinstatement by Plant Manager Wilkerson on March 13, 1989. The offer of reinstatement was in fact made on March 10, 1989. The judge in addition stated in the fifth paragraph of that section that Gonzalez agreed that his first work shift on reinstatement would be on March 10, 1989. Rather, Gonzalez agreed that his first work shift would be on March 11, 1989.

[2] We have carefully reviewed the judge's decision with respect to the remedial obligation owed by the Respondent to discriminatee Jose Castro and find that this issue merits further consideration. Accordingly, the portion of the judge's recommended Order with respect to Castro is severed and is subject to further consideration by the Board.

IT IS FURTHER ORDERED that the portion of the judge's recommended Order relating to Jose Castro is severed and shall be subject to further consideration by the Board.

Peter Tovar, Esq., for the General Counsel.
Ryan McCortney, Esq. (Sheppard, Mullin, Richter & Hampton), of Los Angeles, California, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on March 4 and 5 and June 14, 1993. On January 22, 1992, the Board issued its Decision and Order (306 NLRB 100) finding that Respondent, Hoffman Plastic Compounds, Inc., had violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board ordered, inter alia, that Respondent offer Casimiro Arauz, Jose Castro, and Moises Gonzalez full reinstatement to their former positions and that Respondent make whole Mauricio Mejia, Arauz, Castro, and Gonzalez for any loss of earnings they may have suffered because of their unlawful layoffs. On April 10, 1992, Respondent and the General Counsel entered into a stipulation whereby Respondent waived its right under Section 10(e) and (f) of the Act to contest the propriety of the Board's Order issued on January 22, 1992, or the findings of fact and conclusions of law underlying that Order. A controversy having arisen over the amount of backpay due and the terms of the Board's Order, on September 30, 1992, the Regional Director for Region 21 of the Board issued a compliance specification and notice of hearing. On October 4, 1993, Respondent and the General Counsel reached agreement on the backpay for Mejia and that settlement has been satisfied. On October 27, 1993, Respondent and Arauz reached settlement on Arauz' claims. Counsel for the General Counsel approved the settlements on October 29, 1993. I approved the settlement on November 3, 1993, and issued an order granting the Parties' joint motion to withdraw the allegations of the compliance specification concerning Arauz and Mejia.

The issues remaining for decision are (1) whether Respondent made valid offers of reinstatement to Castro and Gonzalez in March 1989; (2) whether Gonzalez voluntarily quit his employment in March 1989; and (3) whether Respondent should be ordered to offer Castro, an undocumented worker, reinstatement to his former job. After resolution of these principal issues, there remains the computation of backpay and the resolution of some subsidiary issues necessary thereto.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties,[1] I make the following

FINDINGS AND CONCLUSIONS

In the underlying case, on January 31, 1989, Respondent laid off nine employees. The Board found that the layoff was for economic reasons and would have occurred regardless of the union organizing activities. However, the Board agreed with Administrative Law Judge Gordan J. Myatt that Respondent in order to rid itself of known union supporters, discriminatorily selected union adherents for layoff. The Board and the judge found that Mauricio Mejia was recalled in March 1989 and found it unnecessary to order reinstatement. Although the record indicated that Respondent sent recall letters to Casimiro Arauz, Moises Gonzalez, and Jose Castro, the effect of the recall letters was left to the compliance stage of the proceeding.

On March 10, 1989, Respondent sent recall letters to the laid-off employees including the two discriminatees at issue, Castro and Gonzalez. The letters stated:

> Please contact Robert Wilkerson as to your availability for work no later than 4 P.M., Monday, March 13, 1989.
>
> It looks like we'll need a few men soon.

Moises Gonzalez testified that he met with Wilkerson on March 13 with his Supervisor Ramon Rosas acting as interpreter. According to Gonzalez he was told he could come back to work if he dropped his claim (the instant charge) against Respondent. Gonzalez agreed to begin working on the graveyard shift that evening. Gonzalez did not show up for work. He testified that his daughter was ill and that he had to take her to the hospital.[2] Gonzalez testified that on Monday, Wilkerson called him and said that the owner did not want Gonzalez and that there was no job for him.

Wilkerson testified that he offered Gonzalez work on the graveyard shift and that Gonzalez accepted the offer. Gonzalez was scheduled to work that Saturday and Sunday evenings. According to Wilkerson, Gonzalez did not show up for work or call in. On the following Monday, after Gonzalez did not call in, Wilkerson discharged Gonzalez for abandoning his job. Wilkerson denied ever telling Gonzalez not to come to work. Wilkerson had a position open for Gonzalez. Both Wilkerson and Rosas denied that there was any mention of dropping the claim or charge. I credit their denials. First, Gonzalez made no mention of this condition on the recall to work in his 1990 testimony. Second, Wilkerson's testimony was corroborated by his notes and business records. Third, Wilkerson's testimony was corroborated by that given by Rosas. I found Rosas to be a very credible witness. Thus, I credit Wilkerson's and Rosas' testimony over that of Gonzalez.

Rosas testified that Gonzalez came and asked for work and that the two of them went to speak with Wilkerson. Wilkerson told Gonzalez that he could work on the graveyard shift and Gonzalez agreed to work that evening. Gonzalez did not show up for work on either Saturday or Sunday evening. Rosas reported these facts to Wilkerson on Monday morning. Rosas further testified that shortly thereafter he saw Gonzalez and asked what had happened. Gonzalez answered that he had ''messed up.''

[1] Briefs were filed by Respondent and General Counsel on November 1, 1993.

[2] In the underlying case, Gonzalez testified that he took his son to the hospital.

I find that backpay for Gonzalez was terminated as of March 13, 1989, when he failed to return to work. The credible testimony of Rosas and Wilkerson shows that Gonzalez, after agreeing to work, did not show up for work or call in to explain his absences. After 3 days, Wilkerson could, in accordance with his past practice as to consecutive absences, lawfully assume that Gonzalez had abandoned his employment. The fact that Respondent was presented with the opportunity to terminate its backpay liability and/or the opportunity to discharge Gonzalez is of no legal consequence. *Klate Holt Co*., 161 NLRB 1606, 1612 (1966); *P. G. Berland Paint City*, 199 NLRB 927, 927–928 (1972).

The General Counsel argues that Gonzalez was not fully reinstated and, therefore, could turn down this job. I find no evidence to support that allegation. The evidence indicates that Gonzalez was offered the same job he had before the layoffs and that he told Rosas that he was ''happy'' with the offer. Although no mention was made to Gonzalez that he would return to work without prejudice to his seniority, the failure to do so does not invalidate the offer and acceptance. *National Screen Products Co*., 147 NLRB 746, 747 (1964).

Gonzalez would have been discharged for this conduct regardless of the prior union activity. Respondent treated the unexplained failure to report for work as grounds for immediate termination. The evidence shows that Respondent would have discharged any employee based on the unexplained failure to report to work for 3 days. No other employees known to have engaged in similar conduct were retained. *Animal Humane Society*, 287 NLRB 50 (1987).

The compliance specification, as amended, assumes that Gonzalez would have received raises every 6 months. However, I find that his backpay period terminated prior to the time he would have received a raise.

The record reveals that Castro was sent a recall letter on March 10, 1989. The letter was sent by certified mail to the address he had given the employer and was signed for by his niece. Castro has used his niece's home as his mailing address for many years and continues to do so. Castro did not respond to the letter. He testified that he never received the letter and that his niece never told him about the letter.

According to Castro, 2 years after his discharge he returned to Respondent's plant and asked for work. Castro testified that Wilkerson turned him down because he did not speak English. Wilkerson credibly denied this incident. Wilkerson testified that he never saw or spoke with Castro after the layoff of January 1989. According to Wilkerson, one half of the employees do not speak English. He hired Castro in 1988 even though the employee spoke no English.

Respondent discovered at the backpay hearing that Castro used fraudulent identification in applying for work with Respondent. Castro used a fraudulent birth certificate as identification for immigration purposes.[3] Castro testified that he used a friend's birth certificate and that he uses that certificate to work in the United States. Castro also had a California driver's license and a social security card evidently obtained by use of the fraudulent birth certificate. He testified that he uses the false identification in order to work in this country. Castro is not authorized to work in this country. Respondent contends that since it did not know that Castro was not authorized to work it cannot be now ordered to employ him in contradiction of the immigration laws.

In *Sure Tan, Inc. v. NLRB*, 467 US 883 (1984), the Supreme Court held that undocumented workers are employees within the meaning of the Act. However, discriminatees will be deemed unavailable for work during any period in which they are not lawfully entitled to be present and employed in the United States. Backpay is, therefore, tolled during any period when a discriminatee is not lawfully authorized to work in this country. Subsequent to *Sure Tan*, Congress passed the Immigration Reform and Control Act of 1986 (IRCA) making the employment of unauthorized aliens unlawful and imposing sanctions on employers who knowingly hire them.

In the instant case, Castro was hired subsequent to the effective date of IRCA (November 6, 1986) by using false identification. The record shows that Respondent attempted to comply with IRCA. Castro admitted that at no time was he lawfully entitled to work in this country. Thus, I find that under the Supreme Court's ruling in *Sure Tan*, Castro is not entitled to backpay as of the date of the hearing. However, as noted above, Respondent has not yet offered reinstatement to Castro. The issue is whether Respondent should be ordered to reinstate Castro conditioned on his obtaining lawful authorization to work in this country.

Respondent argues that it attempted to comply with IRCA and only hired Castro based on the false information and identification supplied to it. Thus, Respondent contends that it never would have hired Castro had the facts been known and that Castro should not be entitled to any remedy.

In *Fiber Glass Systems*, 298 NLRB 504, 506 (1990), the Board followed the Circuit Court of Appeals for the Fifth Circuit and ruled that the employer could show in the compliance stage of the proceedings that the discriminatee never would have been hired. However, the Board indicated that it was following the court's remand as the law of the case and was making no determination on the issue.[4] The Board has not since addressed this issue.

Since Respondent did not knowingly hire Castro in violation of IRCA, it appears that the best result would be not to order Respondent to make an offer of reinstatement. Castro was not lawfully authorized to work in the United States at the time of his hire, his termination, the unfair labor practice hearing, nor the backpay hearing. Castro and the General Counsel had the opportunity to show that Castro was now authorized to work in this country but did not do so. Further, there is no evidence that Castro has made application for authorization to work in this country. The presumption is that Castro will continue to lack authority to work lawfully in this country. Thus, a reinstatement order, even conditioned on Castro obtaining authorization to work in this country, would be putting form over substance. A proper remedy should not order actions that would be futile.

I find the cases cited by the General Counsel to be inapposite. In *A.P.R.A. Fuel Oil*, 309 NLRB 480 (1992), cited by the General Counsel, the Board ordered reinstatement of two employees who were not authorized to work in this country. However, in each instance the employer knew at the time of

[3] Castro was born in Mexico and the birth certificate is for someone born in El Paso, Texas.

[4] See *W. Kelly Gregory, Inc*., 207 NLRB 654 (1973); *National Packing Co*., 147 NLRB 446 (1964); and *Southern Airways*, 124 NLRB 749 (1959).

hire that the employee was not authorized to work and had hired him in violation of IRCA. In *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), the Court of Appeals for the Ninth Circuit ordered backpay for undocumented workers whose claims arose prior to the effective date of IRCA. In *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), the Seventh Circuit Court of Appeals held that undocumented workers were not entitled to backpay and reinstatement. The workers there had also been hired prior to the effective date of IRCA.

In the instant case, there is nothing to suggest that Respondent hired any employee in violation of IRCA. With respect to Castro, the employee was required to file an I-9 form and submit proper identification. The fraudulent identification was not apparent and there is nothing to suggest that Respondent knew of Castro's status until the last day of the hearing. Respondent raised Castro's status as an undocumented worker after Castro's admissions at the hearing. Finally, in the above-cited cases the Board left the remedy issues to the compliance stage of the proceedings. Here we are at the compliance stage and Castro is still not authorized to work in the United States. Under these circumstances, I believe the litigation should come to an end and will not order a futile reinstatement remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

It is ordered that Respondent, Hoffman Plastic Compounds, Inc., forthwith pay to each of the following persons backpay in the amounts set opposite his name, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), as required by the Board's Order of January 22, 1992:

Jose Castro	$0.00
Moises Gonzalez	1,638.50

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.